

Case No. S239686



**IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA**

**SUPREME COURT
FILED**

SEP 12 2017

Jorge Navarrete Clerk

STANLEY WILSON,
Plaintiff and Appellant,

Deputy

v.

CABLE NEWS NETWORK, INC. et al.,
Defendants and Respondents.

After a Decision By the Court of Appeal
Second Appellate District, Division 1, Case No. B264944
Los Angeles Superior Court Case No. BC559720 (Hon. Mel Red Recana)

RESPONDENTS' OPENING BRIEF ON THE MERITS

MITCHELL SILBERBERG & KNUPP LLP
*ADAM LEVIN (SBN 156773), axl@msk.com
JOLENE KONNERSMAN (SBN 217574), jrk@msk.com
CHRISTOPHER A. ELLIOTT (SBN 266226), cae@msk.com
11377 West Olympic Boulevard
Los Angeles, CA 90064-1683
Telephone: (310) 312-2000

Attorneys for Defendants and Respondents CABLE NEWS NETWORK,
INC., a Delaware corporation; CNN AMERICA, INC., a Delaware
corporation; TURNER SERVICES, INC., a Georgia corporation; TURNER
BROADCASTING SYSTEM, INC., a Georgia corporation; PETER
JANOS, an individual

Case No. S239686

**IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA**

STANLEY WILSON,
Plaintiff and Appellant,

v.

CABLE NEWS NETWORK, INC. et al.,
Defendants and Respondents.

After a Decision By the Court of Appeal
Second Appellate District, Division 1, Case No. B264944
Los Angeles Superior Court Case No. BC559720 (Hon. Mel Red Recana)

RESPONDENTS' OPENING BRIEF ON THE MERITS

MITCHELL SILBERBERG & KNUPP LLP
*ADAM LEVIN (SBN 156773), axl@msk.com
JOLENE KONNERSMAN (SBN 217574), jrk@msk.com
CHRISTOPHER A. ELLIOTT (SBN 266226), cae@msk.com
11377 West Olympic Boulevard
Los Angeles, CA 90064-1683
Telephone: (310) 312-2000

Attorneys for Defendants and Respondents CABLE NEWS NETWORK,
INC., a Delaware corporation; CNN AMERICA, INC., a Delaware
corporation; TURNER SERVICES, INC., a Georgia corporation; TURNER
BROADCASTING SYSTEM, INC., a Georgia corporation; PETER
JANOS, an individual

TABLE OF CONTENTS

	<u>Page</u>
I	
ISSUES TO BE BRIEFED	9
II	
INTRODUCTION AND SUMMARY OF ARGUMENT	9
III	
STANDARD OF REVIEW	13
IV	
STATEMENT OF FACTS.....	14
A. Wilson’s Employment as a News Producer for CNN and CNN.com.....	14
B. CNN’s Process For Assigning News Reporting And Its Editorial Decisions Regarding Publication	15
C. Wilson’s Termination For Plagiarism.....	16
D. Wilson’s Superior Court Complaint.....	17
E. The Superior Court’s Order Granting Defendants’ Anti-SLAPP Motion.....	19
F. The Court of Appeal’s Split Opinion.....	20
V	
ARGUMENT	24
ISSUE NO. 1: Under the first prong of the anti-SLAPP statute, is the employer’s alleged discriminatory motive for terminating the plaintiff employee irrelevant (as held by the Second Appellate District, Division 7 and Fourth Appellate District, Division 2)?	24
A. The Plain Terms of the Anti-SLAPP Statute Contain No Exception for Employment Discrimination or Retaliation Claims.....	27
B. This Court’s Prior Decisions Do Not Support An Exception To The Anti-SLAPP Statute for Discrimination and Retaliation Claims.	31
1. <i>Navellier</i>	32
2. <i>Park</i>	38
3. <i>Flatley</i>	41

TABLE OF CONTENTS
(continued)

	<u>Page</u>
C. Though There Exists a Split Amongst The Courts of Appeal, The Better Reasoned Decisions Hold That Discrimination and Retaliation Claims Are Subject To The Anti-SLAPP Statute.	42
1. <i>Tuszynska</i>	43
2. <i>Hunter</i>	44
3. <i>Nam and Bonni</i>	46
4. Other decisions.....	48
D. The anti-SLAPP Statute’s Legislative History Does Not Support An Exception Applicable to Discrimination and Retaliation Claims.	51
E. Public Policy Supports Inclusion of Discrimination and Retaliation Claims Within the Scope of the Anti-SLAPP Statute.....	53
ISSUE NO. 2: Under the first prong of the anti-SLAPP statute, must the defendant demonstrate that the plaintiff had “name recognition” or was “otherwise ‘in the public eye?’”	57
A. The Plain Terms of The Anti-SLAPP Statute Support A Broad Construction of The Phrase “In Connection With A Public Issue or an Issue of Public Interest.”	59
B. This Court’s Precedent Does Not Support The Court of Appeal’s “Public Interest” Analysis.....	62
C. Prior Decisions Of the Court of Appeal Are At Odds With The Court of Appeal’s Narrow Construction of The Anti-SLAPP Statute	64
D. Public Policy Supports A Broad Application Of The Anti-SLAPP Statute To Communications Involving Non-Celebrities	67
E. CNN’s Allegedly Defamatory Statement Was In Connection With An Issue Of Public Interest.....	69
VI CONCLUDING STATEMENT.....	72

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Ampersand Publ’g, LLC v. NLRB</i> (D.C.Cir. 2012) 702 F.3d 51	52
<i>Averill v. Superior Court</i> (1996) 42 Cal.App.4th 1170	65
<i>Barry v. The State Bar of California</i> (2017) 2 Cal.5th 318	31
<i>Beach v. Harco National Ins. Co.</i> (2003) 110 Cal.App.4th 82	47
<i>Beilenson v. Superior Court</i> (1996) 44 Cal.App.4th 944	47
<i>Bonni v. St. Joseph</i> (2017) 13 Cal.App.5th 851	45, 46, 47
<i>Brodeur v. Atlas Entertainment, Inc.</i> (2016) 248 Cal.App.4th 665	58
<i>Chaker v. Mateo</i> (2012) 209 Cal.App.4th 1138	65
<i>Chavez v. Mendoza</i> (2001) 94 Cal.App.4th 1083	48
<i>Church of Scientology v. Wollersheim</i> (1996) 42 Cal.App.4th 628	47
<i>Claybrooks v. Am. Broad. Co.</i> (M.D. Tenn. 2012) 898 F.Supp.2d 986.....	54
<i>Club Members for an Honest Election v. Sierra Club</i> (2008) 45 Cal.4th 309	25
<i>Commonwealth Energy Corp. v. Investor Data Exchange</i> (2003) 110 Cal.App.4th 26	60
<i>Country Side Villas Homeowners Assn. v. Ivie</i> (2011) 193 Cal.App.4th 1110	65

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Daniel v. Wayans</i> (2017) 8 Cal.App.5th 367	44
<i>DeCambre v. Rady Children’s Hospital-San Diego</i> (2015) 235 Cal.App.4th 1	35, 48
<i>Equilon Enterprises v. Consumer Cause, Inc.</i> (2002) 29 Cal.4th 53	47
<i>Fahlen v. Sutter Central Valley Hospitals</i> (2014) 58 Cal.4th 655	49
<i>FilmOn.com v. DoubleVerify, Inc.,</i> (2017) 13 Cal.App.5th 707	61, 63, 66, 68
<i>Flatley v. Mauro</i> (2006) 39 Cal.4th 299	40, 41
<i>Gallanis-Politis v. Medina</i> (2007) 152 Cal.App.4th 600	24, 49
<i>Hecimovich v. Encinal School Parent Teacher Organization</i> (2012) 203 Cal.App.4th 450	58, 64
<i>Hunter v. CBS Broadcasting Inc.</i> (2013) 221 Cal.App.4th 1510 9, 19, 20, 21, 24, 38, 39, 43, 44, 46, 55, 59	
<i>Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.</i> (2005) 129 Cal.App.4th 1228	24
<i>Imperial Merchant Services, Inc. v. Hunt</i> (2009) 47 Cal.4th 381	30
<i>Ingels v. Westwood One Broadcasting Services, Inc.</i> (2005) 129 Cal.App.4th 1050	49, 51, 53, 65
<i>Jarrow Formulas, Inc. v. LaMarche</i> (2003) 31 Cal.4th 728	26, 29, 30, 58
<i>Kibler v. Northern Inyo County Local Hospital Dist.</i> (2006) 39 Cal.4th 19	24

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Lieberman v. KCOP Television, Inc.</i> (2003) 110 Cal.App.4th 156	65
<i>Lyle v. Warner Bros. Television</i> (2006) 38 Cal.4th 264	9
<i>M. G. v. Time Warner, Inc.</i> (2001) 89 Cal.App.4th 623	63
<i>McDermott v. Ampersand Publ'g, LLC</i> (9th Cir. 2010) 593 F.3d 950	52
<i>McGarry v. Univ. of San Diego</i> (2007) 154 Cal.App.4th 97	65
<i>Morrow v. Los Angeles Unified School Dist.</i> (2007) 149 Cal.App.4th 1424	65
<i>Navellier v. Sletten</i> (2002) 29 Cal.4th 82 24, 31, 32, 33, 34, 35, 36, 41, 43, 44, 46	
<i>Nelson v. McClatchy Newspapers</i> (1997) 131 Wn.2d 523	52
<i>Nesson v. Northern Inyo County Local Hospital Dist.</i> (2012) 204 Cal.App.4th 65	49
<i>Okorie v. Los Angeles Unified School Dist.</i> (2017) 2017 Cal.App.LEXIS 712	49
<i>Park v. Board of Trustees of California State University</i> (2017) 2 Cal.5th 1057 12, 35, 37, 38, 39, 40, 43, 44, 46, 49, 50	
<i>Rivera v. First DataBank, Inc.</i> (2010) 187 Cal.App.4th 709	58
<i>San Diegans for Open Government v. San Diego State University Research Foundation</i> (2017) 13 Cal.App.5th 76,104	48, 68
<i>Sarver v. Chartier</i> (9th Cir. 2016) 813 F.3d 891	63

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Seelig v. Infinity Broadcasting Corp.</i> (2002) 97 Cal.App.4th 798	65
<i>Shulman v. Group W Productions, Inc.</i> , 18 Cal.4th 200	67
<i>Sipple v. Foundation for Nat. Progress</i> (1999) 71 Cal.App.4th 226	65
<i>Soukup v. Law Offices of Herbert Hafif</i> (2006) 39 Cal.4th 260	25
<i>Tamkin v. CBS Broadcasting, Inc.</i> (2011) 193 Cal.App.4th 133	63, 71
<i>Taus v. Loftus</i> (2007) 40 Cal.4th 683	25, 61, 63
<i>Terry v. Davis Community Church</i> (2005) 131 Cal.App.4th 1534	64, 66
<i>Tuszynska v. Cunningham</i> (2011) 199 Cal.App.4th 257	9, 19, 20, 42, 43, 44, 46
<i>Wallace v. McCubbin</i> , 196 Cal.App.4th 1169	49
<i>Wilson v. Cable News Network, Inc.</i> (2016) 6 Cal.App.5th 822	10, 19, 20, 21, 22, 35, 36, 40, 49, 57, 66

STATUTES

Code Civ. Proc.	
§ 425.16.....	18, 27, 28, 29, 30, 31, 32, 34, 35, 36, 39, 40, 44, 46, 47, 49, 50, 54, 55, 56, 58, 60, 66
§ 425.16(a)	26, 27, 28, 29, 58
§ 425.16(b)(1)	23, 26, 27
§ 425.16(d)	29
§ 425.16(e)	27, 28
§ 425.16(e)	31
§ 425.16(e)(1)	27, 29
§ 425.16(e)(2)	28, 39, 45
§ 425.16(e)(3)	28

TABLE OF AUTHORITIES
(continued)

	Page(s)
§ 425.16(e)(4)	28, 39, 56, 58
§ 425.17.....	51
§ 425.17(b).....	30
§ 425.17(c)	30
§ 425.17(d).....	51
FEHA.....	17, 18, 42

I

ISSUES TO BE BRIEFED

(1) Under the first prong of the anti-SLAPP statute, is the employer's alleged discriminatory motive for terminating the plaintiff employee irrelevant (as held by the Second Appellate District, Division 7 and Fourth Appellate District, Division 2)?

(2) Under the first prong of the anti-SLAPP statute, must the defendant demonstrate that the plaintiff had "name recognition" or was "otherwise 'in the public eye?'"

II

INTRODUCTION AND SUMMARY OF ARGUMENT

For mainstream news organizations like CNN, a reputation for journalistic ethics is at the core of their First Amendment mission to truthfully and reliably report the news. This is particularly true at present when news organizations face daily public attacks concerning the accuracy of their reporting, the integrity of their journalists and even the authenticity of their medium.

These concerns lie at the heart of the present matter. Here, in an exercise of its editorial judgment, CNN terminated the employment of plaintiff and appellant Stanley Wilson ("Wilson" or "Plaintiff"), a news

producer who admitted to plagiarizing a story from the Los Angeles Times and submitting it for publication on CNN.com as his own work. In his lawsuit, Wilson retaliated against CNN for exercising its editorial discretion to refrain from allowing him to write news stories published on its website and seen by millions of viewers worldwide. Such challenges to the First Amendment rights of the press should be dealt with at the earliest opportunity to avoid chilling protected speech. (*See Lyle v. Warner Bros. Television* (2006) 38 Cal.4th 264, 300 (hereafter *Lyle*) [“Indeed, cases like this, arising in a creative context, often can and should be decided on demurrer. Because even the taking of depositions could significantly chill the creative process, by destroying the mutual trust and confidentiality necessary to writing television shows like *Friends*, courts should independently review the allegations to ensure that First Amendment rights are not being violated.”] (conc. opn. of Chin, J.) (citations omitted).)

California’s anti-SLAPP statute provides a tool for challenging attacks on protected speech at their inception. Until very recently, the Courts of Appeal had applied the statute to employment discrimination claims with little controversy. (*See e.g., Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510 (hereafter *Hunter*); *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257 (hereafter *Tuszynska*).) The decision of the Court of Appeal below rejecting this precedent is a radical departure from

settled law, and would make this critical tool unavailable to California employers faced with claims of discrimination, retaliation and harassment when trying to protect their First Amendment rights.

This is of particular concern to news organizations—like CNN—that are in the business of disseminating speech and are held to high ethical standards by themselves and the public. The public’s trust in a news organization can easily be damaged by the errant conduct of a news reporter or producer. As a result, news organizations must make difficult editorial decisions about who will write its news stories and who will not. Challenges to such editorial decisions present important constitutional issues involving freedom of speech and the press, and the anti-SLAPP statute affords a critical protection against lawsuits filed in retaliation for the exercise of constitutionally protected rights.

The Court of Appeal in this case held that the mere allegation of a discriminatory or retaliatory *motive* is sufficient to take a case outside the protections of the anti-SLAPP statute, regardless of the nature of the *conduct* in which those motivations manifested themselves. (*Wilson v. Cable News Network, Inc.* (2016) 6 Cal.App.5th 822, 833-37 (hereafter *Wilson*)).) The Court of Appeal’s ruling creates by judicial fiat a wholesale exception to the anti-SLAPP statute for all claims of employment discrimination or retaliation.

The Court of Appeal's ruling directly conflicts with the plain terms of the statute which contains no exception for employment discrimination or retaliation claims, prior holdings of this Court, decisions of other Courts of Appeal, applicable legislative history and public policy. Accordingly, this Court should reverse the Court of Appeal's Order.

The Court of Appeal's Order suffers from an additional defect. The Court of Appeal misread the anti-SLAPP statute and applied an unprecedented test for determining whether the acts underlying the plaintiff's claims were "in connection with" an "issue of public interest." The Court of Appeal mistakenly focused on whether Wilson was a figure "in the public eye" or a "celebrity," when the correct focus should have been on whether a public interest existed that was *connected to* CNN's alleged defamatory communication that Wilson had plagiarized. The statute does not require that the plaintiff be "of public interest;" it requires only that the alleged speech furthering act be "in connection with ... an issue of public interest."

Here, the challenged act is a discussion between CNN management about Wilson's plagiarism in connection with a story about renowned Los Angeles County Sheriff Lee Baca (which he claims was defamatory) which undeniably is in connection with the public interest in news reporting generally, and journalistic ethics and accuracy of news reporting in

particular. Put differently, plagiarism is a form of dishonesty that is inextricably linked to a news organization's public reputation.

Accordingly, CNN satisfied its burden under the first prong of the anti-SLAPP statute. Because the Court of Appeal never reached the second prong of the analysis, the Order should be reversed and the matter remanded for consideration of the second prong under which Wilson must demonstrate a probability of prevailing on the merits.

III

STANDARD OF REVIEW

This Court reviews de novo the grant or denial of an anti-SLAPP motion. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067 (hereafter *Park*)). The Court “exercise[s] independent judgment in determining whether, based on our own review of the record, the challenged claims arise from protected activity. In addition to the pleadings, [the Court] may consider affidavits concerning the facts upon which liability is based. [The Court does] not, however, weigh the evidence, but accept[s] the plaintiff’s submissions as true and consider[s] only whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law.” (*Id.* (citations omitted).)

IV

STATEMENT OF FACTS

A. Wilson's Employment as a News Producer for CNN and CNN.com.

Defendant and Respondent CNN is one of the world's most influential sources for news and information, and is ranked among the most trusted news organizations in the world. (Volume 1 of Appellant's Appendix in Lieu of Clerk's Transcript p. 107:11-15.)¹ CNN's online arm is CNN.com. (V1AA/107:22-26.) CNN.com attracts 7-9 million unique domestic visitors daily, and from 50-60 million page views globally. (V1AA/107:27-108:1.)

According to Wilson's Declaration, he began his employment with CNN in 1996. (V2AA/346:21-347:2.) During his tenure at CNN, Wilson produced a wide range of high profile news stories that were published under his by-line, including "investigative reports," "live remote coverage," "breaking news, political coverage, and documentary programs" across the nation. (V2AA/347:3-12.) Wilson has "written approximately 200 articles for publication while at CNN" (V2AA/359:18.) Wilson "contributed to

¹ Hereafter, citations to Appellant's Appendix will be cited as (V Number AA/pg/line).

CNN.com with original stories, breaking news and companion pieces to support reporter packages.” (V2AA/347:17-18.) Wilson also produced field coverage for Election 2000, two highly rated news documentaries, and other stories covering breaking national and international news.

(V2AA/347:3-26.) According to his declaration, Wilson was publicly recognized with “more than two dozen journalism awards for breaking news, investigative reporting, and documentary programming, including Emmy Awards for coverage of Election 2012, Election 2008, and the September 11, 2011 terrorist attacks” among other awards.

(V2AA/348:1-6.)

B. CNN’s Process For Assigning News Reporting And Its Editorial Decisions Regarding Publication

CNN continuously exercises editorial choices to decide what is newsworthy and warrants reporting and who should report on those matters. (V1AA/108:5-6.) In addition, CNN continuously exercises editorial discretion in determining the depth and scope of coverage, what to post to CNN.com, the timing of when articles appear, where the articles appear, and what visual material accompanies them. (V1AA/108:6-9.) These choices fundamentally and intentionally shape the message and content of CNN’s communications to its audience. (V1AA/108:9-10.)

News stories on CNN.com are often written by “field producers,” like Wilson. (V1AA/61:10-12.) Because the public’s perception of a news story—including public confidence in its accuracy—is shaped, in part, by the producer who wrote the story, field producers’ reputations, credibility and journalistic ethics are also factors considered by CNN in making employment decisions. (V1AA/61:13-16.)

Like most major news organizations, CNN does not permit plagiarism (i.e., copying text from a story written by another without giving attribution to the original author). (V1AA/64:20-21.) Employees who commit plagiarism will be subject to discipline up to and including termination. (V1AA/64:22.) The accuracy and originality of field producer’s research and writing directly impacts the public’s perception of the credibility of news and information published by CNN and its trust in CNN as a news reporting agency. (V1AA/64:24-27.)

C. Wilson’s Termination For Plagiarism

On or about January 7, 2014, CNN determined that a story submitted by Wilson for publication on CNN.com concerning the retirement of Los Angeles County Sheriff Lee Baca contained substantial material that had been copied verbatim from a story published that same day in the Los Angeles Times, without attribution. (V1AA/62:3-7, V1AA/65:10-13.) The

CNN Digital copy editor that made this discovery, Cathy Straight, recommended that CNN not publish Wilson's article about Sheriff Baca's retirement announcement and that CNN do an audit of Wilson's prior work. (V1AA/62:7-8, V1AA/65:10-16, V1AA/69-71.)

Wilson submitted a written statement to CNN's Human Resources Manager, Dina Zaki, in which he tried to justify and explain his actions in submitting the Sheriff Baca story—which he admitted contained “inserted passages from another source”—as “accidental,” and a “mistake” but nevertheless admitted that he had “exercise[ed] poor judgment” and “violated good journalistic principles,” and that the plagiarism was solely his “fault.” (V1AA/110:13-26, V1AA/113-117.) Subsequently, CNN audited a sampling of Wilson's previous stories and discovered numerous additional instances of plagiarism, raising serious doubts about Wilson's claim of “accident.” (V1AA/65:17-66:27, V1AA/73-105.) Based upon the findings of the investigation, CNN terminated Wilson's employment. (V1AA/62:12-16, V1AA/110:27-28.)

D. Wilson's Superior Court Complaint.

On October 6, 2014, Wilson filed his Complaint asserting seven causes of action. (V1AA/1-25.)

Wilson's first and second causes of action for discrimination and retaliation in violation of the Fair Employment and Housing Act ("FEHA") and his third cause of action for retaliation in violation of the California Family Rights Act ("CFRA") are based on (1) CNN's decision not to hire Wilson into other story producer positions at CNN (V1AA/8:2-3); (2) CNN's decision to issue Wilson a written warning for "violating CNN['s] single-sourcing policy" (V1AA/8:13-14); (3) CNN's promotion of another reporter, Jack Hannah, to the position of producer (V1AA/9:15-20); (4) CNN's decision to have Hannah report on "high profile field assignments" (V1AA/9:23-28); (5) CNN's decision to have Wilson do writing assignments in connection with "in-house packaging and fill-in work" (V1AA/9:23-28); (6) CNN's selection of another reporter for a White House reporting position (V1AA/10:14-18); (7) CNN's story editing process (V1AA/10:19-22, V1AA/10:23-24); (8) CNN's decision not to publish Wilson's story about the retirement of Sherriff Lee Baca after it had concerns that the story "appeared too similar to another story" (V1AA/10:19-22, V1AA/10:25-27); (9) CNN's audit of Wilson's work (V1AA/11:7-9); and (10) CNN's termination of Wilson for violating CNN's editorial standards (V1AA/11:10-14). (*See also* V1AA/14:3-5, V1AA/15:15-17, V1AA/17:9-11.)

Wilson's fourth, fifth and sixth causes of action for failure to prevent discrimination and retaliation in violation of FEHA, wrongful termination in violation of public policy and declaratory judgment, respectively, are all based on the same alleged acts of discrimination and retaliation.

(V1AA/18:8-13, V1AA/18:14-15; V1AA/19:23-26; V1AA/21:25-22:6.)

Wilson's seventh cause of action for defamation is based on CNN's alleged statements at the time of his termination about Wilson's plagiarism and violation of CNN's standards and policies. (V1AA/23:7-10.).

E. The Superior Court's Order Granting Defendants' Anti-SLAPP Motion.

On January 12, 2015, CNN filed a special motion to strike Wilson's Complaint under Code of Civil Procedure Section 425.16, California's "anti-SLAPP statute. (V1AA/36-58).

After oral argument on April 14, 2015, the Superior Court granted CNN's anti-SLAPP motion, and dismissed the case on April 20, 2015. (V5AA/1195-1208.) Wilson subsequently filed an appeal. (V5AA/1227-1228.)

F. The Court of Appeal's Split Opinion.

In a 2-1 decision, the Court of Appeal reversed the trial court's order over a strong dissent by Presiding Justice Frances Rothschild. As to the first through sixth causes of action (alleging discrimination, retaliation, wrongful termination in violation of public policy, and failure to prevent discrimination, retaliation, and harassment), the split Court determined that "the discrimination and retaliation [Wilson] has alleged are not acts in furtherance of defendants' free speech rights." (*Wilson, supra*, 6 Cal.App.5th at p. 834.) The Court of Appeal found that:

[T]he gravamen of plaintiff's employment-related causes of action was defendants' allegedly discriminatory and retaliatory conduct against him, not the particular manifestations of the discrimination and retaliation, such as denying promotions, assigning him menial tasks, and firing him. (*Id.* at 836.)

In reaching this conclusion, the majority expressly declined to follow the rulings of the Second Appellate District in *Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510, and the Fourth Appellate District in *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257. The majority described these cases as adopting the "erroneous view that discrimination is merely a motive and the erroneous principle ... that a defendant's motives are always irrelevant to a determination of whether the defendant's acts were in furtherance of its free speech or petitioning rights." (*Wilson, supra*,

6 Cal.App.5th at p. 836.) The majority thereby created a split amongst the Courts of Appeal, and also misread *Hunter* and *Tuszynska*.

The Court of Appeal went on to apply its erroneous interpretation of the anti-SLAPP statute and found that “where plaintiff does not allege an employment contract and was employed by a private corporation, not a governmental entity, the only reason the defendants’ failure to promote and firing of plaintiff are actionable is that they were allegedly acts of discrimination and retaliation.” (*Wilson, supra*, 6 Cal.App.5th at p. 835.)

Therefore, it concluded:

Absent these “motivations,” Wilson’s employment-related claims would not state a cause of action and defendants no doubt would have demurred, not filed an answer and anti-SLAPP motion. Discrimination and retaliation are not simply motivations for defendants’ conduct, they *are* the defendants’ conduct. (*Ibid.*)

Next, as to Wilson’s defamation cause of action, the Court of Appeal determined that there was “no connection between the defendants’ allegedly defamatory statements about plaintiff and a public issue or issue of public interest.” (*Wilson, supra*, 6 Cal.App.5th at p. 837.) The majority (wrongly) emphasized that “the record does not show that plaintiff was a person in the public eye,” distinguishing him from the “local celebrities” in *Hunter* or a widely-known anchor. (*Ibid.*) The majority further concluded that the allegedly defamatory statements “did not involve conduct that could affect large numbers of people beyond the direct participants,” and

was not “so grave and scandalous to make it a topic of widespread public interest.” (*Id.* at p. 838-39 fn. 4.) The majority rejected arguments that the public’s interest in the story Wilson plagiarized was relevant, concluding instead that the “allegedly defamatory statement to the effect that plaintiff plagiarized passages in the Baca article in no way contributed to public debate regarding Baca’s retirement.” (*Id.* at p. 839.)

Presiding Justice Rothschild dissented. Following *Hunter*, Justice Rothschild reviewed the evidence and concluded that “Wilson had a significant role in shaping and reporting the news.” (*Wilson, supra*, 6 Cal.App.5th at p. 842.) Therefore, “if the employment decision of hiring a weather anchor in *Hunter* ‘qualifies as an act in furtherance of the exercise of free speech,’ so do the employment decisions concerning the work of a CNN news producer such as Wilson.” (*Ibid.*). Justice Rothschild noted the factual differences between this case and *Nam*, and wrote that the majority, and the court in *Nam*, made the error of “conflat[ing] the first prong analysis, in which the court determines whether the alleged injury-producing act was in furtherance of the defendant’s right of petition or free speech, and the second prong analysis, which consider the merits of the cause of action. By considering the merits of whether the defendant’s acts were unlawful—i.e., whether they were discriminatory, harassing, or retaliatory—the court ‘confuse[d] the threshold question of whether the

SLAPP statute applies with the question whether [the plaintiff] has established a probability of success on the merits.” (*Id.* at p. 843 (quoting *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 305).)

The dissent also criticized the majority’s holding that Wilson’s claims did not involve a matter of public interest. Again citing *Hunter*, the dissent wrote “[t]he subjects of Wilson’s body of work with CNN undeniably concern matters that are of interest to the public as much or more than local reports of the weather.” (*Wilson, supra*, 6 Cal.App.5th at p. 845.) Noting the majority’s focus on whether Wilson was a person in the public eye, the dissent correctly noted that “[t]he public interest issue ... does not turn on whether Wilson is a public celebrity. Regardless of whether the general public is aware of Wilson’s name, CNN’s actions and statements concerning him—a widely-honored news and documentary producer with one of the world’s largest and most respected news organizations—are connected with a matter of public interest.” (*Ibid.*)

The Court of Appeal reversed the trial court. Neither party filed a petition for rehearing in the Court of Appeal.

V

ARGUMENT

ISSUE NO. 1: Under the first prong of the anti-SLAPP statute, is the employer’s alleged discriminatory motive for terminating the plaintiff employee irrelevant (as held by the Second Appellate District, Division 7 and Fourth Appellate District, Division 2)?

In order to be covered by California’s anti-SLAPP statute, challenged claims must be based on “act[s]” of the defendant “in furtherance” of its “right of petition or free speech ... in connection with a public issue.” (Code Civ. Proc. § 425.16(b)(1).)²

Here, CNN satisfied this requirement because all of Wilson’s claims are based on CNN’s actions in terminating his employment producing news stories for CNN.com and communicating that decision. CNN exercises its right of free speech through the news stories it publishes to the public, and its decision about who will write those stories is “in furtherance” of that right.

The Court of Appeal below effectively rewrote the statute to exempt all claims for employment discrimination, harassment, or retaliation. Such

² All statutory references are to the California Code of Civil Procedure unless otherwise noted.

an exemption runs contrary to the plain language of the statute, applicable precedent, legislative history and public policy.

These authorities all demonstrate that the determination of whether a claim is based on an “act ... in furtherance of ... free speech” is made based on an examination of the specific action or conduct underlying each claim. Labels and alleged motivations are irrelevant. While some causes of action require proof of *both* an act *and* a bad motive, the focus of the statute is on the *act* alone.

So, for example, the following causes of action were all found subject to the anti-SLAPP statute based on examination of the underlying acts alone:

Cause of Action	Underlying Act	Case
Defamation	Communication of a false statement	<i>Kibler v. Northern Inyo County Local Hospital Dist.</i> (2006) 39 Cal.4th 19
Fraud	Misrepresentation or omission of facts	<i>Navellier v. Sletten</i> (2002) 29 Cal.4th 82
Breach of Contract	Filing counterclaims and other acts in breach of agreement	<i>Navellier v. Sletten</i> (2002) 29 Cal.4th 82
Intentional Infliction of Emotional Distress	Dumping red paint on driveway, ringing doorbell late at night and other acts of outrageous behavior	<i>Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.</i> (2005) 129 Cal.App.4th 1228
Discrimination	Failing to hire as weather anchor	<i>Hunter v. CBS Broadcasting Inc.</i> (2013) 221 Cal. App.4th 1510
Retaliation	Conducting investigation, preparing report and other adverse actions	<i>Gallanis-Politis v. Medina</i> (2007) 152 Cal.App.4th 600

Invasion of Privacy	Disclosing private facts	<i>Taus v. Loftus</i> (2007) 40 Cal.4th 683
Breach of Fiduciary Duty	Favoring some board candidates over others	<i>Club Members for an Honest Election v. Sierra Club</i> (2008) 45 Cal.4th 309
Malicious Prosecution	Filing lawsuit	<i>Soukup v. Law Offices of Herbert Hafif</i> (2006) 39 Cal.4th 260

Under the Court of Appeal’s ruling, those of the above claims that require proof of motive (e.g., fraud, discrimination, retaliation, malicious prosecution) would not be subject to an anti-SLAPP motion.

And so, in the instant matter, the Court of Appeal erred by relying on the bare allegations of discriminatory and retaliatory motives to exclude Wilson’s claims from coverage under the anti-SLAPP statute. Instead, the Court of Appeal should have examined the *acts* underlying Wilson’s claims—to wit, CNN’s alleged failure to assign Wilson certain reporting opportunities and termination of his employment as a producer responsible for writing articles for its website—and concluded that they were in furtherance of free speech and covered by the anti-SLAPP statute. The Court of Appeal’s reading of the statute effectively extinguishes for employers like CNN important protections against retaliatory lawsuits directed at chilling free speech. The Court of Appeal’s Order should be reversed.

A. The Plain Terms of the Anti-SLAPP Statute Contain No Exception for Employment Discrimination or Retaliation Claims.

In determining whether a court should consider alleged motive in applying the anti-SLAPP statute, the Court should first look at the plain language of the statute. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735.)

The anti-SLAPP statute was enacted because “there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” (§ 425.16(a).) The Legislature found that “it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.” (*Ibid.*)

Given these findings, the Legislature established a procedure whereby a defendant can bring a “special motion to strike” “[a] cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue.” (§ 425.16(b)(1).) A plaintiff bringing such a cause of action then